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Evelyn Muir v. Apache Nitrogen Products and W. H. Burt Explosives v. Douglas Bailey : Reply Brief

Utah Court of Appeals

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940553CA

IN THE UTAH COURT OF APPEALS

EVELYN MUIR, Plaintiff and Appellant, vs. APACHE NITROGEN PRODUCTS and W.H. BURT EXPLOSIVES, Defendants and Appellees, vs. DOUGLAS BAILEY, Third-party Defendant	**APPELLANT'S REPLY BRIEF** Appeal No. 940553-CA (Argument Priority 15)

APPEAL FROM THE SEVENTH DISTRICT COURT, GRAND COUNTY
JUDGE ANDERSON

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ARGUMENT

POINT ONE

EVIDENCE THAT DEFENDANTS UNDERTOOK TO WARN AGAINST A LIST OF SPECIFIC UNSAFE LIGHTING METHODS BUT DID NOT INCLUDE THE METHOD EMPLOYED BY MR. MUIR ON THAT LIST OF UNSAFE METHODS RAISES A JURY QUESTION AS TO THE ADEQUACY OF THE WARNING.

Page 20 of the Brief of W. H. Burt and Pages 12 and 13 of the Brief of Apache rely on the following written instructions and warnings provided to Mrs. Muir's late husband:

> **LIGHTING SAFETY FUSE**
>
> Step 1: Make sure you can reach a safe location after lighting with sufficient time before initiation.
>
> Step 2: Place sufficient stemming over the explosive material to protect it from fuse-generated heat and sparks.
>
> Step 3: Have a partner before lighting the fuse. One person should light the fuse, and the other should time and monitor the burn.
>
> Step 4: Light the safety fuse, using a specially designed lighter:

> Single-fuse ignition - hot wire lighters, pull-wire lighters or thermalite connectors.
>
> Multiple-fuse ignition - igniter cord with thermalite connectors.
>
> * **Always** light fuse with a fuse lighter designed for the purpose.
>
> * **Always** use the "buddy system" when lighting safety fuse - one lights the fuse, the other times and monitors.
>
> . . . .
>
> * **Never** use matches, cigarette lighters, cigarettes, pipes, cigars, carbide lamps, or other unsafe means to ignite safety fuse.

The jury question is not whether or not these written instructions were given to Mr. Muir, but whether the explosives industry as a whole, in promulgating these instructions, negligently omitted to warn against the use of spitter fuse as a lighter when using explosives.

While the industry instructions warn never to use "matches, cigarette lighters, cigarettes, pipes, cigars, carbide lamps, or other unsafe means to ignite safety fuse," the use of spitter fuse as a lighter is not prohibited and is conspicuously absent from the list.

Douglas Bailey testified during Plaintiff's case in chief as a witness who had been present at the site of the explosion utilizing the "buddy system" who personally experienced the blast that killed Mr. Muir and injured Mr. Bailey. He was also called to testify as an expert blaster and was treated as such in questioning by both the Plaintiff and the Defendants.

The following key testimony came into evidence during the Plaintiff's case in chief as Mr. Bailey was cross examined concerning the above referenced instructions and warnings.

> Q. And I don't see anywhere, do you, where it says spitter fuse is an approved lighter?
>
> A. It don't say it's not approved.
>
> Q. It lists those things that are approved, doesn't it?
>
> A. But it don't say this is not approved, does it?

(R. 1469)

While Mr. Bailey is obviously not an expert in the proper grammatical use of the word "don't" in the English language, he was treated as a blasting expert by both the Plaintiff and the Defendants at the trial, and clearly testifies during the case in chief that there was a failure by Defendants to warn against the use of spitter fuse as a lighter.

Mrs. Muir's deceased husband was not an experienced blaster. He was a baker who was using the explosives in his weekend treasure hunting hobby activities. It is for a lay jury of his peers to decide whether the instructions promulgated by the explosives industry which failed to expressly warn against the use of spitter fuse for lighting were adequate to warn and instruct a lay person such as Mr. Muir not to use a spitter.

The absence of warning and the testimony of Mr. Bailey are both evidence in the record that must be examined in the light most favorable to Mrs. Muir, and since reasonable minds could differ and there is a reasonable basis in the evidence and in the

inferences to be drawn therefrom that would support a judgment in her favor, the directed verdict cannot be sustained. **Steffensen v. Smith's Management Corp.,** 820 P.2d 482 (Utah App. 1991), affirmed, 862 P.2d 1342 (Utah 1992); **Penrod v. Carter**. 727 P.2d. 199 (Utah 1987).

Furthermore, the MSHA report on the accident which was included by Plaintiff in the record on appeal and relied upon in establishing evidence of failure to warn remains as further evidence requiring jury trial. Argument by Appellees that the MSHA report should be construed as concluding that there was an absence of respect for the explosives rather than an absence of knowledge concerning the use of the explosives should be decided by the jury as a question of fact, not by the court in a directed verdict. Evidence that the MSHA inspectors may have stated absence of respect and absence of knowledge in the alternative must be resolved by the jury, and Mrs. Muir is entitled to have the MSHA report of the cause of the accident that is in evidence as Trial Exhibit 38 and that is part of the record on appeal examined in the light most favorable to her.

The MSHA inspectors concluded that Mr. Muir lacked knowledge of or respect for the explosives used by the way that he was involved in lighting the charges. Contrary to the argument by Defendants that the written instructions and warnings somehow explicitly stated that the method used for lighting the charges in the present case is dangerous and should not be used, there is in fact no such explicit statement anywhere in the written warnings and instructions admitted into evidence, there is a conspicuous absence of any such explicit statement in the materials admitted into evidence, and there is a genuine jury question as to whether the instructions and warnings were adequate and whether there was a failure to warn that the method

used for lighting the charges in the present case was dangerous and should not be used.

Contrary to the argumentative assertion by Appellees that the evidence "conclusively" established that it was respect for explosives that Bailey and Muir lacked, not knowledge, in regard to the evidence that the MSHA inspectors that investigated the accident found that the "accident resulted from the total lack of knowledge of or respect for the explosives used," (Brief of Apache, Page 10), the evidence does not "conclusively" establish the argumentative proposition asserted by Appellees, they fail to cite to any evidence in the record that would support this proposition at all, let alone "conclusively" establish it, and this is the very kind of argument that should be made to the jury after the matter is properly submitted to the jury rather than being erroneously taken away from the jury by a directed verdict.

By bare argument Defendants also assert that the method used for lighting the charges in this case was so obviously dangerous that they somehow have no duty to warn against the use of the spitter fuse method of lighting because is somehow obviously dangerous. On the contrary, the evidence shows that the spitter fuse method of lighting had been successfully and safely used by Mr. Muir and Mr. Bailey in this treasure trove hunting operation in blasts prior to the blast that widowed Mrs. Muir. (Exhibit 38) Again, because Mrs. Muir is entitled to have this evidence viewed in the light most favorable to her, the alleged obviousness of the danger also gives rise to a question for the jury that should not have been taken away from the jury by way of directed verdict. Plaintiff's counsel put his eggs into the defective products basket after the directed verdict removed the claim for failure to warn, but should never have had to do so in this case

and should have been allowed to argue failure to warn to the jury and have the jury decide that claim.

POINT TWO

THIS CASE SHOULD BE USED AS A MODERN CASE TO HOLD THAT THE COUNTY WHERE THE PRODUCT WAS PURCHASED IS A PROPER VENUE FOR TRIAL IN A DEFECTIVE PRODUCT CASE.

The case of **Schramm/Johnson Drug v. Cox,** 9 P.2d 399 (1932) provides that a cause of action in a defective products case arises both in the county where the product was sold and the county where the resulting harm occurred. Defendants do not contest that this case has never been overruled, but try to escape its doctrine by labelling the doctrine as dictum and discounting the case due to its age.

The appeal now before the Court of Appeals provides an opportunity to set forth doctrine that is clearly holding rather than dictum in a modern case that stands for the proposition that the county of point-of-sale is a proper venue for the trial of a defective products case.

Defendants have provided no persuasive argument for why the doctrine the **Schramm/Johnson Drug v. Cox** case should not be so honored and reaffirmed. By opening a store in Davis County and selling products to persons living along the Wasatch Front, Defendant W.H. Burt intentionally benefitted from engaging in commerce in that county and can and should reasonably be required to appear and litigate in the courts of that county.

The argument by Defendants and the erroneous ruling by the trial court that Davis County was not a proper venue for trial

should be rejected, and this Court should hold that purchasers of allegedly defective products can sue in the courts of the county where they purchased the product, which is consistent with **Schramm/Johnson v. Cox**, supra.

POINT THREE

IT IS NOT GENUINELY DISPUTED THAT MRS. MUIR'S FAMILY PHYSICIAN GAVE A PROFESSIONAL OPINION THAT SHE SHOULD NOT TRAVEL TO MOAB, AND IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO MAKE A MEDICAL JUDGMENT CONTRARY TO THAT OF MRS. MUIR'S OWN FAMILY PHYSICIAN WITHOUT TAKING EVIDENCE OR HOLDING A HEARING.

Since the advent of the Americans With Disabilities Act, the appellate and trial courts in Utah routinely include with their notices instructions that persons with special physical needs should contact the ourt in advance.

In this case, Evelyn Muir notified the trial court that she would not be able to attend trial in Moab, and even provided to the trial court a letter from her family physician, a copy of which is annexed hereto, in which the physician states that it is his "professional opinion that Evelyn Muir should not travel to Moab" and that he "would strongly recommend that she stay in Salt Lake City" by way of this same letter which was addressed to her counsel and provided to the trial court.

It is undisputed that this letter was provided to the trial court well in advance of trial and that Mrs. Muir informed the trial court, through counsel, that she would be unable to attend the trial as scheduled in Moab. It is further undisputed that the trial court denied her request that venue be changed to Davis County based on a conclusion of law that Davis County was not a

proper venue for trial, a legal conclusion challenged as being erroneous in Point Two above.

A trial court does not have the discretion to incorrectly apply the law. The Court of Appeals should reaffirm the **Schramm/Johnson v. Cox** case as set forth in Point Two above, and having done so, should further hold that the undisputed fact that Evelyn Muir timely notified the trial court that she was physically unable to attend the trial of her own case, provided the trial court with a letter from her family physician to that effect, and was then not present at trial, is sufficient to establish an abuse of discretion on the part of the trial court.

The notifications as sent out by trial and appellate courts under the Americans With Disabilities Act to the effect that persons with physical needs should notify the courts in advance of hearings ought not to be turned into a tool for tactical adversarial litigation aimed at preventing litigants from attending the trials of their own cases.

Nothing more was required of Evelyn Muir and nothing more should be required of litigants in the future who in good faith notify trial and appellate courts of special physical needs as they are invited to do under the Americans With Disabilities Act notification routinely sent with notices of trial and appellate courts of this state. If a Court is going to require more, notice and an opportunity to be heard should first be provided and evidence should be taken. It was an abuse of discretion to require more without providing notice and opportunity to provide more and to make a medical judgment without setting a hearing and taking evidence.

CONCLUSION

This case should be reversed and remanded with a mandate to change venue to Davis County for a jury trial on all three claims for relief.

DATED this 10 day of April, 1995

ROBERT H. COPIER
Attorney for Evelyn Muir

MAILING CERTIFICATE

On this 10 day of April, 1995, I did mail true and correct copies of the foregoing APPELLANT'S REPLY BRIEF to Roger P. Christensen at 175 So. West Temple, Suite 510, Salt Lake City, Utah 84101 and Shawn Draney at P.O. Box 45000, Salt Lake City, Utah 84145.

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ADDENDUM

Family Physician

5263 South 300 West #203 Murray, Utah 84107 Telephone (801) 288-8881

09/21/93
Robert Copier
243 E. 400 S.
Salt Lake City, Utah 84111

It is my professional opinion that Evelyn Muir should not travel to Moab as she will not be able to maintain the diet that I have started with her and the additional stress will also complicate her already fragile medical condition. She is very underweight and has lost 50 pounds in the last 2 and 1/2 years due to continual diarrhea. Requiring her to live in a motel and eat in restaurants in Moab will increase her stress and will probably worsen her condition. If there is any way to avoid this change I would strongly recommend that she stay in Salt Lake City.

Sincerely,

Dennis D Harper, D.O.